RAMANATHAN A/L CHELLIAH

v.

PENDAKWA RAYA

COURT OF APPEAL, KUALA LUMPUR
DATO' SHAIK DAUD ISMAIL JCA
DATO' N.H. CHAN JCA
DATO' ABDUL MALEK AHMAD J
[CRIMINAL APPEAL NO. W-09-30-1994]
30 NOVEMBER 1995

CRIMINAL PROCEDURE: *Trial - Accused ordered to be handcuffed while in Court - Whether unlawful - Whether a matter of discretion of the presiding Judge - Whether discretion to be exercised judiciously.*

This was an appeal against the decision of the learned High Court Judge, ruling in an application for a revision, that the order made by the learned Sessions Judge ordering that the accused be handcuffed while in Court was a proper order that merited no revision. The facts were that on 4 October 1994 the appellant was produced before the Sessions Court, Kuala Lumpur on two counts of charges under s. 354 Penal Code for allegedly outraging the modesty of two athletes. While being so produced, and indeed throughout the entire period when he was in Court, the appellant was put under handcuffs by the police. Despite objection by Counsel, and despite an application being made for the removal of the handcuffs, the learned Sessions Judge, however, was adamant that the handcuffs remain. The facts further showed that it was not after the arraignment proceedings were over, and after bail has been offered and entered, that the handcuffs were removed from the appellant.

Dissatisfied, the appellant applied to the High Court for a revision of the order. Before the learned Judge, the appellant argued, firstly, that the decision to handcuff him while he was in Court was improper as he was then under the custody of the Court, and not that of the police, and secondly, that there existed no grounds whatsoever upon which the Court could exercise its discretion to order the handcuffs. The learned Judge, nonetheless, dismissed the motion ruling that the order was proper, and that both on facts and principles there was no room for him to revise.

The appellant appealed. Before the learned Judges of the Court of Appeal the primary issue that arose was whether ordering an accused to be handcuffed while in Court is a matter of discretion of the Court, and if so, whether in making the order she did, the learned Sessions Judge herein had exercised her discretion judiciously.

Held:

Per Shaik Daud Ismail JCA (delivering the judgment of the Court):

[1] It is in the sole discretion of the presiding officer to consider whether it is essential to have an accused person handcuffed, be it during the trial or at the arraignment. Such discretion must be exercised judiciously and not merely because the prosecution wants it to be. Further such discretion could be exercised only upon an application being made by the prosecution and also upon some credible material before the Court in support or otherwise of the application.

[2] The fact that the accused was not then on bail cannot be a sufficient basis to justify handcuffing the accused. So also the fact that the accused was then facing the two criminal charges in question.

[3] In the instant appeal, there was nothing on record to indicate that an application to handcuff the accused has been made by the prosecution, or that any credible material had been put before the Court. In the circumstances, the Sessions Judge had not exercised her discretion judiciously.This appeal is therefore allowed notwithstanding that the issue has now become academic.

Per curiam: It is timely to remind lower Courts of the observations made by the superior Courts in Y*aakub bin Ahmad v. Public Prosecutor* and *Public Prosecutor v. Wee Swee Siang*, and by the Chief Justice in the Chief Justice's circular of 24 February 1987 on the handcuffing of accused persons in Court, which observations brought home the point that, although some form of restraint may be necessary when the accused is violent, or has committed a crime of violence or has attempted to escape, it is not the normal practice to put any restraint on him when he appears before a Court to be tried for a criminal offence.

[Appeal allowed. No order made]

[Bahasa Malaysia *Translation of Headnotes]*

PROSEDUR JENAYAH: *Perbicaraan - Tertuduh diperintahkan supaya digari ketika berada di dalam Mahkamah - Samada salah di sisi undang-undang - Samada merupakan perkara budibicara Hakim yang bersidang - Samada budibicara hendaklah dilaksanakan menurut budibicara kehakiman.*

Ini adalah satu rayuan terhadap keputusan Hakim Mahkamah Tinggi yang bijaksana, yang memutuskan dalam satu permohonan untuk penyemakan, bahawa perintah yang dibuat oleh Hakim Mahkamah Sesyen memerintahkan supaya tertuduh digari ketika berada di Mahkamah adalah merupakan satu perintah yang teratur dan tidak bermerit untuk disemak semula. Fakta-faktanya

adalah bahawa pada 4 Oktober 1994, tertuduh telah dikemukakan di hadapan Mahkamah Sesyen, Kuala Lumpur atas dua pertuduhan di bawah s. 354 Kanun Keseksaan kerana dikatakan telah mencabul kehormatan dua orang olahragawati. Ketika dikemukakan di hadapan Mahkamah, dan sesungguhnya di sepanjang tempoh beliau berada di Mahkamah tersebut, perayu telah digari oleh polis. Walaupun terdapat bantahan oleh Peguam, dan permohonan dibuat supaya ditanggalkan gari tersebut, Hakim Mahkamah Sesyen yang bijaksana, namun begitu, tidak berganjak dengan pendiriannya bahawa gari tersebut harus dikekalkan. Fakta-fakta selanjutnya menunjukkan bahawa hanya selepas hadap prosiding tuduh selesai, dan jaminan telah ditawarkan dan dimasuki, barulah gari tersebut ditanggalkan daripada tangan Perayu.

Berasa tidak puashati, perayu telah memohon kepada Mahkamah Tinggi untuk penyemakan terhadap perintah di atas. Dihadapan Hakim yang bijaksana, perayu tersebut telah berhujah, pertamanya, bahawa keputusan untuk menggari beliau ketika beliau berada di Mahkamah adalah tidak wajar, kerana beliau ketika itu berada di bawah jagaan Mahkamah, dan bukannya di bawah jagaan polis, dan keduanya, bahawa tidak wujud apa-apa alasan sekalipun di atas mana Mahkamah boleh melaksanakan budibicaranya untuk memerintahkan supaya beliau digari. Hakim yang bijaksana, namun begitu, telah menolak usul dan memutuskan bahawa perintah tersebut adalah wajar, dan bahawa berdasarkan kedua-dua, fakta dan prinsip, tidak terdapat alasan bagi beliau membuat semakan.

Perayu telah merayu. Di hadapan Hakim-hakim Mahkamah Rayuan yang bijaksana isu utama yang berbangkit adalah sama ada memerintahkan supaya seseorang tertuduh digari ketika berada di Mahakamh merupakan suatu perkara mengenai budibicara Mahkamah, dan jika sedemikian, sama ada dalam membuat perintah seperti yang telah beliau lakukan, Hakim Mahkamah Sesyen yang bijaksana di sini telah melaksanakan budibicaranya secara kehakiman.

Diputuskan:

Oleh Shaik Daud Ismail, HMR (menyampaikan penghakiman Mahkamah):

[1] Ianya adalah merupakan semata-mata budibicara pegawai yang bersidang untuk menimbangkan sama ada ianya penting bagi seseorang tertuduh di gari, sama ada ketika perbicaraan ataupun ketika dihadap-tuduh. Budibicara yang sedemikian haruslah dilaksanakan menurut budibicara kehakiman dan bukannya semata-mata kerana pihak pendakwaan mahukan sedemikian. Selanjutnya, budibicara yang sedemikian, hanya boleh dilaksanakan setelah satu permohonan di buat oleh pendakwaan dan juga setelah bahan-bahan yang boleh dipercayai dikemukakan di hadapan Mahkamah bagi menyokong permohonan tersebut atau sebaliknya.

[2] Fakta bahawa tertuduh di sini itu tidak terikat pada apa-apa jaminan, tidak boleh menjadi asas bagi mewajarkan tertuduh digari. Begitu juga dengan fakta bahawa tertuduh ketika itu sedang menghadapi dua tuduhan jenayah.

[3] Dalam rayuan semasa ini, tidak terdapat apa-apa dalam catatan bagi menunjukkan bahawa satu permohonan untuk menggari tertuduh telah dibuat oleh pidak pendakwaan, atau bahawa terdapatnya apa-apa bahan yang boleh dipercayai yang telah pun dikemukakan di hadapan Mahkamah. Dalam keadaan yang sedemikian, Hakim Mahkamah Sesyen telah tidak melaksanakan budibicaranya menurut budibicara kehakiman rayuan ini dengan itu dibenarkan walaupun isu tersebut kini menjadi soal akademi semata-mata.

Per Curiam:

Ianya tepat pada masanya untuk mengingatkan Mahkamah-Mahkamah rendah mengenai pemerhatian yang telah dibuat oleh Mahkamah atasan dalam *Yaakub bin Ahmad lwn. Pendakwa Raya* dan *Pendakwa Raya lwn. Wee Swee Siang*, dan pemerhatian oleh Hakim Besar dalam pekeliling Hakim Besar bertarikh 24 Februari 1987 berhubung dengan menggari orang-orang tertuduh di dalam Mahkamah, pemerhatian yang mana telah memberikan kesimpulan bahawa, walaupun sesuatu bentuk sekatan mungkin diperlukan ketika sitertuduh ganas, atau pun telah melakukan jenayah yang ganas atau pun telah cuba untuk melarikan diri, namun ianya bukan merupakan amalan biasa untuk mengenakan apaapa jenis penyekatan terhadapnya ketika beliau hadir di hadapan sesebuah Mahkamah untuk dibicarakan atas sesuatu kesalahan jenayah.

[Rayuan dibenarkan. Tiada perintah dibuat]

Cases referred to:
Yaakub bin Ahmad v. PP [1975] 2 MLJ 223 ***(refd)***
PP v. Wee Swee Siang [1948] 14 MLJ 114 ***(refd)***

For the appellant - Karpal Singh (M/s Karpal Singh & Co.)
For the respondent - Stanley Augustin, Deputy Public Prosecutor

JUDGMENT

Shaik Daud Ismail JCA:

This is an appeal from the decision of the learned High Court Judge sitting at Kuala Lumpur, where the learned Judge had refused to exercise his revisionary powers against the decision of the Sessions Court. The facts leading to this appeal are not in dispute.

The appellant Ramanathan s/o Chelliah was produced before the Sessions Court on 4 October 1994 at 11.00 a.m. on two charges of allegedly outraging the modesty of two of our athletes, an offence under s.354 of the Penal Code. He was brought to Court in handcuffs from the Jalan Bandar Police Station. He was put in the dock of the Court for the charges to be read to him.

During this time he was still handcuffed. His Counsel Mr. Karpal Singh objected to his client being handcuffed while he was in the dock and applied to the learned Sessions Judge to have the handcuffs removed. The learned Deputy Public Prosecutor Mr. Stanley Augustin opposed the application whereupon the learned Sessions Judge rejected the application of learned defence Counsel and the appellant remained handcuffed. After the arraignment proceedings were over, the appellant was released on bail and presumably it was then that the handcuffs were removed. The appellant not being satisfied with the decision of the learned Sessions Judge filed a motion in the High Court requesting a revision of that order. The learned Judge after hearing arguments and considering the affidavits filed by both parties dismissed the motion on the grounds that:-

> The facts and the principles leave me no room to revise. The learned Sessions Court Judge's order does not appear to be against the .... correctness, legality or propriety.

From this ruling it would appear that in the circumstances of this case, the learned Judge was of the view that the order to have the appellant handcuffed was proper.

Mr. Karpal Singh argued here and in the Court below that it was improper for the appellant to remain handcuffed in the dock, and the learned Sessions Judge ought to have ordered its removal. He argues that once an accused person is put in the dock, he is under the custody of the Court and no longer that of the police. Furthermore, there were no grounds whatsoever, upon which the Court could exercise its descretion to order the handcuffs.The learned Deputy Public Prosecutor, on the other hand, is of the view that even though an accused person is in the dock, he is still in the custody of the police and as long as he is not on bail, he ought to be handcuffed for reasons of security.

Although we think that this appeal is now academic, after considering the records of appeal and hearing the arguments of both learned Counsel, we are of the view that it would be useful for us to give our observations on this issue for guidance for future cases. Mr. Karpal Singh cited the then Federal Court case of *Yaakub bin Ahmad v PP* [1975] 2 MLJ 223 a case of armed robbery under s. 392 Penal Code where at p. 224 Gill CJ (as he then was) made these observations:-

> As an accused person is presumed innocent until he is proved guilty, **it is not the normal practice to put any restraint on him** when he appears before a court to be tried for a criminal offence. Some **sort of restraint, however, may be become necessary where the accused is violent or has committed a crime of violence or may have attempted to escape**. In the present case the learned Deputy Public Prosecutor applied for permission of the Court to have the accused handcuffed during the trial as he had made several attempts to escape.
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> (the emphasis is added).

In giving these observations, it is obvious that the learned Chief Justice had in mind the salutory observations of Callow J. in *PP v Wee Swee Siang* [1948] 14 MLJ 114, a case of gang robbery where at p. 115 the learned Judge observed:-

> I should mention, before concluding, the complaint of Mr. Salt that the accused was brought to the Court below in manacles. An accused person is innocent until he is proved guilty, and **restraint is not usually required unless the accused is violent or has committed a crime of violence or that he may attempt to escape**. As to whether violence or escape was anticipated in this case I do not know. I hope those responsible for the custody of accused persons will bear these observations in mind, and refrain from the use of handcuffs on unconvicted persons unless essential.
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> (the emphasis is added).

The Chief Justice's circular on the handcuffing of accused persons in Court dated 24 February 1987 appear to be couched in a similar tone as the two cited cases.

In the final analysis, it is in the sole discretion of the presiding officer to consider whether it is essential to have an accused person handcuffed be it during the entire trial or at the arraignment, if and when an application is made by the prosecution. Needless to say such discretion must be exercised judiciously and not merely because the prosecution wants it to be. It would seem clear to us from the Chief Justice's circular and the observations in both the above quoted cases that firstly there must be an application by the prosecution and in order for the Court to exercise its discretion judiciously there must be some credible material before the Court in support or otherwise of the application.

In the present appeal involving Mr. Ramanathan s/o Chelliah and based on the record of proceedings before us, we could not find anywhere that an application was made by the learned Deputy Public Prosecutor nor could we find any credible material put before the Court. The learned Deputy Public Prosecutor conceded that the only ground put forward was that the appellant was not on bail then. We are unanimously of the view that based on the alleged charges faced by the appellant, it can hardly be justified for him to be handcuffed. We are also of the view that the learned Sessions Judge did not, therefore, exercise her discretion judiciously.

It is therefore timely to remind lower Courts to bear these observations in mind when exercising their discretion in such situations. We would therefore allow the appeal but as mentioned earlier the issue being now academic, we make no order on the appeal.

Reported by W.A. Sharif